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MICHAEL RODAK, JR., CLERK

No. 80, Original

IN THE

Supreme Court of the United States

October Term, 1977

STATE OF COLORADO, *Plaintiff*

v.

STATE OF NEW MEXICO,
AND TONEY ANAYA,
ATTORNEY GENERAL OF THE STATE OF
NEW MEXICO, *Defendants*

ANSWER AND MOTION TO REFER TO SPECIAL MASTER

JEFF BINGAMAN,
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January 22, 1979

VERGARA PRINTING CO. - SANTA FE, NEW MEXICO

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ANSWER

The defendants, the State of New Mexico and Jeff Bingaman, successor to Toney Anaya, Attorney General of the State of New Mexico, pursuant to the Court's order of November 27, 1978, in answer to the State of Colorado's Complaint, state:

1. The allegations in paragraphs one through three are admitted.

2. The defendants admit the allegations in paragraph four, but deny the allegation therein that the Vermejo River is tributary to the North Canadian River, which is, in turn, tributary to the Arkansas River . . . ."

3. The defendants admit the allegation in paragraph five that pursuant to Colorado Revised Statutes 1973, §§ 37-92-101, *et seq.*, "jurisdiction over water matters within the State of Colorado is vested in seven district courts, each having jurisdiction over defined river systems within the state . . . ," as specifically stated in Colorado Revised Statutes 1973, §§ 37-92-201, but deny the jurisdiction of such courts to divest prior appropriations in New Mexico.

4. The defendants admit the allegations in paragraph six that Colorado adheres to the doctrine of prior appropriation, that water rights are initiated by appropriation, and that such rights are confirmed by court decree. Based on information and belief New Mexico avers that no water right to the use of Vermejo River waters in Colorado has ever been initiated by diversion and application to beneficial use. New Mexico further avers that under Colorado law the recognition of a conditional or inchoate water right does not imply that there is unappropriated water available for diversion and application to beneficial use.

5. The defendants admit the allegations in paragraph seven, except that they are without sufficient information to determine whether C. F. & I. Steel Corporation has satisfied all legal prerequisites for the water court's June 20, 1975 award of a conditional water right. On information and belief New Mexico avers that no water right to the use of Vermejo River waters in Colorado has ever been initiated by diversion and application to beneficial use under the June 20, 1975 award or any other Colorado "award" to any other person or entity.

6. The defendants admit the allegation in paragraph eight that the federal district court for the district of New Mexico enjoined in Case No. C1V-76-244-P any out-of-priority use of Vermejo River waters in Colorado, but deny that the State of New Mexico supported the plaintiffs as *amicus curiae.* New Mexico's appearance *amicus curiae* was made to inform the court respecting the discussions between Colorado and New Mexico regarding the Vermejo River.

7. The defendants admit the allegation in paragraph nine that representatives of the State of Colorado and the State of New Mexico discussed Vermejo River waters, but deny New Mexico undertook to discuss the possibility of arriving at agreeable terms and conditions for an interstate compact dividing the waters between the two states. Colorado could not have reasonably expected that New Mexico would have divested its citizens of their property rights to accommodate the development plans of C. F. & I. Steel Corporation.

8. The defendants are without sufficient information to form an opinion as to the truth of the allegations in paragraph ten.

9. The defendants are without sufficient information to form an opinion as to the truth of the allegations in paragraph eleven.

10. The defendants deny the allegation in paragraph twelve that the State of Colorado has a right to judicially secure a share of the waters of an interstate stream when Colorado can assert no actual appropriations to beneficial use that give rise to the equities claimed and when the waters of the stream have been fully appropriated in New Mexico.

11. The defendants deny the allegation in paragraph thirteen that the water flowing in the headwater tributaries of the Vermejo River is "water available in south central Colorado," whether in its natural drainage or by means of C. F. & I. Steel

Corporation's proposed transmountain diversion. The defendants further aver that the economy and welfare of the citizens of the Purgatoire River drainage do not depend upon Vermejo River water because they have never appropriated any of it by application to beneficial use.

12. The defendants deny the allegation in paragraph fourteen that the State of Colorado can now equitably claim a share in the waters of the Vermejo River. The defendants further aver that there never has existed and there does not now exist in Colorado any water right to use Vermejo River water based upon diversion and application to beneficial use. The only "valid water right" in Colorado for the diversion and use of Vermejo River waters is not predicated upon actual appropriation to beneficial use, but upon C. F. & I. Steel Corporation's acquisition on June 20, 1975, of an inchoate right to make an appropriation in the future.

AFFIRMATIVE DEFENSES

1. The State of Colorado makes no beneficial uses from the Vermejo River and therefore has no right in equity to Vermejo River water.

2. The State of Colorado's action is barred by laches. An action for equitable apportionment of the Vermejo River no longer lies because the waters of the river were fully appropriated in New Mexico before any appropriation was undertaken in Colorado.

3. As a matter of law and equity the waters of the Vermejo River are *de facto* equitably apportioned.

4. C. F. & I. Steel Corporation's proposed future diversion and application to beneficial use of Vermejo River waters in Colorado cannot form the basis of an apportionment to Colorado of those waters.

WHEREFORE, having fully answered and having asserted their affirmative defenses, defendants pray that the Court deny the plaintiff's claim for equitable apportionment and dismiss this action for want of equity or decree that the waters of the Vermejo River are in fact equitably apportioned.

Respectfully submitted,

JEFF BINGAMAN,
Attorney General of New Mexico

RICHARD A. SIMMS,
Special Assistant Attorney General

JAY F. STEIN,
Special Assistant Attorney General

G. EMLEN HALL,
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MOTION TO REFER TO A SPECIAL MASTER

COMES NOW the defendant, State of New Mexico, on the ground that the composition and responsibilities of the Court are not conducive to the conduct of trial, and moves the Court to refer this action to a Special Master to hear the evidence and report his findings, conclusions, and recommendations as provided by Rule 53 of the Federal Rules of Civil Procedure.

RICHARD A. SIMMS
Special Assistant Attorney General

ATTORNEY FOR THE STATE OF NEW MEXICO

CERTIFICATE OF SERVICE

I, Richard A. Simms, hereby certify, pursuant to Rule 33(3) of the Rules of the Supreme Court of the United States, that on the 22nd of January, 1979, I served the requisite number of copies of the foregoing Answer and Motion to Refer to a Special Master, by first class mail, on the Governor and the Attorney General of the State of Colorado.

RICHARD A. SIMMS
Special Assistant Attorney General

Water Resources Division
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